83 - 1695 (1)

No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1983

HERB NEAL,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Tenth Circuit, and the United States District Court for the Western District of Oklahoma erroneously expanded or ignored this Court's prior holdings requiring that a mailing be sufficiently closely related to an alleged scheme to defraud pursuant to Title 18 U.S.C. Section 1341.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner, Herb Neal, requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered on September 30, 1983, rehearing denied February 17, 1984.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is published at 718 F.2d 1505 (10th Cir. 1983). No opinions were rendered by the Trial Court.

JURISDICTION

The Petitioner is seeking a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit to review its opinion affirming the Trial Court's conviction of the Petitioner. Jurisdiction is invoked under 28 U.S.C. Section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

Title 18 Section 1341 United States Code states:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 763; May 24, 1949, c. 139 Section 34, 63 Stat. 94."

Title 19 Section 339 Oklahoma Statute further states:

"They shall have power:

1. To make all orders respecting the real property of the county, to sell the public grounds of the county and to purchase other grounds in lieu thereof; and for the purpose of carrying out the provisions of this section it shall be sufficient to convey all the interests of the county in such grounds when an order made for the sale and a deed is executed in the name of the county by the chairman of the board of county com-

missioners, reciting the order, and signed and acknowledged by him for and on behalf of the county.

2. To audit the accounts of all officers having the care, management, collection or disbursement of any money belonging to the county or appropriated for its benefit.

3. To construct and repair bridges and to open, lay out and vacate highways: Provided, however, that when any state institution, school or department shall own, lease or otherwise control land on both sides of any established highway, the governing board or body of the same shall have the power to vacate alter or relocate said highway adjoining said property in the following manner:

If it should appear that it would be to the best use and interest of such institution, school or department to vacate, alter or relocate such highway, the governing board or body shall notify the board of county commissioners, in writing, of their intention to hold a public hearing and determine whether to vacate, alter or relocate such highway, setting forth the location and terminals of said road, and all data concerning the proposed right-of-way if changed or relocated, and shall give fifteen (15) days notice of such hearing by publication in some newspaper in the county or counties in which the road is located, and such hearing shall be held at the county seat of the county in which the road is located, and if a county line road, may be heard in either county. At such hearing testimony may be taken, and any protests or suggestions shall be received as to the proposed measure, and at the conclusion thereof if the governing board or body shall find that it would be to the best use and interest of such institution, school or department, and the public generally, they may make an appropriate order either vacating, altering or relocating said highway, which order shall be final; provided further, that such

institution, school or department may by agreement share the cost of changing any such road; and provided further that no property owner shall be denied access to a public highway by such order.

4. Until January 1, 1983, to furnish necessary blank books, plats, blanks and stationery for the clerk of the district court, county clerk, register of deeds, county treasurer and county judge, sheriff, county superintendent of schools, county surveyor and county attorney, justices of the peace, and constables, to be paid for out of the county treasury; also a fire-proof vault sufficient in which to keep all the books, records, vouchers and papers pertaining to the business of the county.

5. To set off, organize and change the boundaries of townships and to designate and give names therefor: Provided, that the boundaries of no township shall be changed within six (6) months next preceding a general election.

6. To do and perform such other duties and acts that the board of county commissioners may be required by law to do and perform."

Title 19 Section 347 Oklahoma Statute states:

"It shall be unlawful for the board of county commissioners to issue any certificate of indebtedness, in any form, in payment of or representing or acknowledging any account, claim or indebtedness against the county, or to make any contracts for or incur any indebtedness against the county in excess of the amount then unexpended and unencumbered of the sum appropriated for the specific item of estimated needs for such purpose theretofore made, submitted, and approved or authorized for such purpose by a bond issue. All warrants upon the county treasurer, for a county purpose, shall be issued upon the order of the board of county commissioners, drawn by the county clerk, signed by the

chairman of the board, and attested by the signature of the county clerk, with the county seal attached. Each warrant shall designate the fund, department and appropriation account, and shall further show the nature of the indebtedness acknowledged by the allowance of the claim so paid. Whenever a county officer holding an elective office will not immediately succeed himself in said office, it shall be unlawful for the board of county commissioners, during the first six months of the fiscal year in which said term of office expires, to approve claims for the operation of said office totaling in excess of one-half the amount allocated for the operation of said office during said fiscal year, unless approval in writing is obtained from the county excise board and any claim in excess thereof in any warrant issued pursuant thereto shall be null and void."

STATEMENT OF THE CASE

A. *Procedural Background of the Case*

The Petitioner herein, Herb Neal, was initially indicted on April 8, 1982, by a Federal Grand Jury in the Western District of Oklahoma. Thereafter, on May 7, 1982, a superseding indictment was returned, charging Petitioner with thirty-four (34) Counts of having devised and intending to devise a scheme to defraud the Counties of the State of Oklahoma, and using the mails in furtherance of this fraud, in violation of Title 18, U.S.C. Sections 1341 and 1342.

The trial of the case commenced on August 16, 1982, and the jury returned its verdict of guilty on Counts 1 through 22 and 24 through 34 on August 24, 1982. The jury returned a finding of not guilty as to Count 23.

On October 14, 1982, the Honorable Fred Daugherty, United States District Judge, sentenced the Petitioner to

the custody of the Attorney General on Count 1 for a period of five (5) years and a One Thousand Dollar ($1,000.00) fine; on Count 2 for five (5) years consecutive to Count 1 with a One Thousand Dollar ($1,000.00) fine; and on Counts 3 through 22 and Counts 24 through 34 to run concurrent to Count 1.

The Petitioner thereinafter timely filed his appeal to the United States Court of Appeals for the Tenth Circuit which rendered its opinion affirming the trial court on September 30, 1983. A copy of the opinion of the United States Court of Appeals for the Tenth Circuit is attached hereto as Appendix "A".

The Petitioner herein timely petitioned the Court of Appeals for a rehearing in his case, with the Petition for Rehearing being denied by the Court of Appeals on February 17, 1984. A copy of the Petition for Rehearing and the Tenth Circuit Opinion overruling same are attached hereto as Appendices "B" and "C".

B. *Relevant Facts Underlining the Petitioner's Conviction*

The Petitioner's case is one of many that arose from an extensive investigation by the F.B.I., the I.R.S., and the United States Attorneys for Oklahoma in the payment to numerous County Commissioners of kickbacks, by suppliers of equipment or materials purchased by the various counties in Oklahoma for road and bridge building and maintenance. During the period set forth in the indictment, the Petitioner worked as a salesman for three companies in Ponca City, Oklahoma, that supplied such materials. The 34-Count indictment which charged the Petitioner was based upon

allegations that the Petitioner herein, and others, devised and intended to devise a scheme and artifice to defraud the counties and the citizens of these counties in the State of Oklahoma by depriving them of their right to have county business conducted openly, honestly, impartially, and free from corruption and undue influence by their elected County Commissioners, and to use the United States Mails in furtherance of the scheme.

The indictment alleged, and the proof at trial showed, that the alleged use of the mails in furtherance of the alleged scheme was the payment of County Warrants or checks, to the suppliers for whom the Petitioner worked. The source of the alleged kickback money was never alleged, nor proven, to bear any relationship to either the purchase price of the equipment, or the mailing of the County Warrants.

Indeed, the Government's allegations as set forth in the indictment, relative to the mailings, was as follows. The Petitioner would submit invoices to the counties which claimed the sale and delivery of road and bridge building and maintenance materials or supplies, thereby causing the County Clerk's Offices to encumber funds as approved by the Commissioner and thereafter send through the U.S. Mails envelopes containing County Warrants as payment for supplies that were delivered. Further, that at some point in time, the Petitioner would pay cash kickbacks to various County Commissioners.

The Petitioner moved for a Judgment of Acquittal at the close of the Government's case in the trial court, claiming that the evidence had failed to show that the mailings

were an integral part of any scheme. The Motion was overruled, and was subsequently renewed at the close of all the evidence, and was again overruled. Finally, after the verdict, the Petitioner moved for a judgment of Acquittal or in the alternative for a new trial, asserting the same argument relative to the failure of the Government's evidence to show that the mailings were an integral part of the scheme as alleged and proven. This argument was submitted to the United States Court of Appeals for the Tenth Circuit, which also rejected same. The Petitioner argued in the trial court, and on appeal, that under this Court's decision in *United States* v. *Maze,* 414 U.S. 395 (1974), the allegations as contained in the indictment, and proof adduced at trial, clearly showed that the mailings involved in Petitioner's case were not an integral part of any scheme to defraud the citizens of the counties of the State of Oklahoma.

EXISTENCE OF JURISDICTION BELOW

Petitioner was convicted in the United States District Court for the Western District of Oklahoma on 33 Counts of a 34-Count indictment charging a violation of Title 18 U.S.C. Section 1341.

REASON FOR GRANTING THE WRIT

The United States Court of Appeals for the Tenth Circuit, in affirming the trial court, has sanctioned a departure of the trial court from the accepted and usual course of judicial proceedings in that both the trial court and the Court of Appeals seemingly ignored this Court's applicable decisions.

I. THE FINDINGS OF THE TRIAL COURT AND THE COURT OF APPEALS THAT THE MAILINGS IN PETITIONER'S CASE WERE AN INTEGRAL PART OF A SCHEME TO DEFRAUD IS IN DIRECT CONFLICT WITH THIS COURT'S DECISIONS.

As stated above, the Petitioner herein was charged with devising a scheme to defraud counties and the citizens of the counties of the State of Oklahoma by depriving them of their right to have county business conducted openly, honestly, impartially, and free from corruption and undue influence by their elected County Commissioners. It was further alleged that the Petitioner used the United States Mail in furtherance of the scheme. Count 1 of the indictment, which is essentially identical to the remaining Counts, is as follows:

"The Grand Jury charges:

COUNT 1

1. During the period commencing on or about January 1, 1975, and continuing thereafter to on or about April of 1981, the exact dates of which are to the Grand Jury unknown, in the Western District of Oklahoma, and elsewhere,

———HERB NEAL———

the defendant herein, while acting as a salesman for Evans and Associates Construction Co., Inc.,

Redstone Industries, Inc., and Stewart Supply Company, Inc., (hereinafter referred to as "The Companies"), all of Ponca City, Oklahoma, companies engaged in the business of selling road and bridge building and maintenance materials and equipment to county governments, devised and intended to devise a scheme and artifice to defraud the counties and the citizens of these counties in the State of Oklahoma by depriving them of their right to have county business conducted openly, honestly, impartially and free from corruption and undue influence by their elected County Commissioners and to use the United States Mails in furtherance of the scheme.

The scheme to defraud was in substance, as follows:

2. As a part of said scheme, HERB NEAL, did cause to be submitted invoices to the counties which claimed the sale and delivery of road and bridge building and maintenance materials or supplies, thereby causing the County Clerk's Offices to encumber funds as approved by the Commissioner and thereafter send through the U.S. Mails envelopes containing County Warrants as payment for supplies that were delivered.

3. As part of said scheme, HERB NEAL paid cash kickbacks to various County Commissioners, including Dwight William Hughey of Alfalfa County; George O'Neil Gray of Alfalfa County; James Leon Roe of Payne County; Leonard Johanning of Grant County; Clifton C. Honeyman of Grant County; and Robert Forbes White of Payne County; in connection with sales of road and bridge building and maintenance materials from The Companies.

4. It was a further part of the scheme that HERB NEAL, while acting as a salesman for The Companies, would enter into lease-purchase agreements

for the road building and maintenance equipment with certain counties and in connection therewith did pay certain County Commissioners cash kickbacks for their purchase of said equipment. As a further part of the scheme, the lease-purchase agreements would be assigned to a bank doing business with the County and thereafter said County would make regular payments to the bank through the mailing of County Warrants through the U.S. Mails to the bank.

4. That on or about April 2, 1979, the exact date of which is to the Grand Jury unknown, in the Western District of Oklahoma,

————HERB NEAL————

the defendant herein, for the purpose of executing the aforesaid scheme to defraud, and atetmpting so to do, did cause to be placed in an authorized mail depository to be sent and delivered by the U.S. Postal Service from Alfalfa County, Oklahoma, to Stewart Supply Company, Inc., Ponca City, Oklahoma, an envelope containing Warrant Number 815, in the amount of $852.95 and Warrant Number 861, in the amount of $100.00, and did pay a cash kickback to George O'Neil Gray; all in violation of Title 18 United States Code, Section 1341 and 2."

As stated by the indictment, it is alleged that the Petitioner, a material supplier, somehow caused the County Clerk's Offices to encumber funds. Thereinafter, the various counties would send County Warrants for payments of the delivered supplies. These County Warrants would be mailed to the supplier, when a sales transaction was consummated, or would be set to a bank, in the event of a lease-purchase arrangement.

The evidence presented by the Government showed that the Petitioner worked for Stewart Supply, relative to Counts 1 through 9 and 11 through 21 of the indictment. One witness for the Government, Dorothy Griffin, testified that she had met with Ralph Stewart, owner of Stewart Supply, to discuss making invoices for Stewart Supply, in order that Stewart Supply would have money to operate on with Commissioners. The substance of this alleged scheme was that Dorothy Griffin, owner of Griffin Lumber Company, would supply vendors with phony invoices to cover sales of non-existent materials to counties. A vendor-supplier would then give Griffin a check for the non-existent material which she would cash. She would thereinafter return 90 to 95% of the money to the vendor-supplier and keep the remaining 5 to 10%. Griffin testified that during her meeting with Ralph Stewart, the Petitioner herein was present, but took no part in the conversation. The Government's theory, relative to the time period when Petitioner worked for Stewart Supply, apparently was that the source of any funds for kickbacks paid by the Petitioner were the phony invoices from Dorothy Griffin. It is important to note, however, that these alleged phony invoices were not involved with any Oklahoma Counties or bogus sales to any Counties.

Other than Griffin's testimony that she was creating invoices for Stewart Supply, there was absolutely no proof offered, that the Petitioner had any access to any alleged funds supplied by Griffin. Indeed, Ralph Stewart, the owner of Stewart Supply, testified that the Petitioner was given no money from Stewart Supply to pay kickbacks. (Trial transcript Volume 3, page 716, lines 19-22). No other

evidence was presented by the Government to indicate any source of funds potentially available to the Petitioner while working at Stewart Supply other than through the invoices with Dorothy Griffin.

In regard to Redstone Industries and Evans & Associates, relative to Counts 10 and 22 through 29 of the indictment, the Government's evidence completely failed to show from what source alleged kickbacks were paid, except possibly from Petitioner's own personal funds. The testimony of the witnesses from Redstone and Evans refuted any theory that potential funds for kickbacks came from either employer. (Trial transcript Volume 1, page 236, lines 3 through 11, 17 through 19, and page 238, line 7). Additionally, it was shown that Petitioner received only a salary while working for these entities and was paid no commission for his sales. As the evidence showed that funds for kickbacks were not related to payment by the county to Stewart Supply, Redstone or Evans, the mailing of the County Warrants simply was not shown to have been the funds for the payment of the kickbacks, or in furtherance of any scheme to defraud.

As this Court is well aware, the Federal Mail Fraud Statute, Title 18 U.S.C. Section 1341, does not purport to reach all frauds, but only those limited instances in which use of the mails is an integral part of the execution of the fraud, leaving all other cases to be dealt with by the appropriate State law. *Kann* v. *United States,* 323 U.S. 83, 56 S.Ct. 148, 89 L.Ed. 88 (1944); *Parr* v. *United States,* 363 U.S. 370, 80 S.Ct. 1170 (1960).

The Petitioner would submit that the dispositive issue in this case is simply whether the mailings were sufficiently

closely related to the alleged scheme, as opposed to whether the mails were used remotely in relation to the alleged scheme. As this Court stated in *United States* v. *Maze,* 414 U.S. 395, 94 S.Ct. 645, 38 L.Ed.2d 603 (1974):

> "[1] In *Pereira* v. *United States,* 347 U.S. 1, 8-9, 74 S.Ct. 358, 363, 98 L. Ed. 435 (1954), the Court held that one 'causes' the mails to be used where he 'does not act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended. . . .' We assume, as did the Court of Appeals, that the evidence would support a finding by the jury that *Maze* 'caused' the mailings of the invoices he signed from the out-of-state motels to the Louisville bank. But the more difficult question is whether these mailings were sufficiently closely related to respondent's scheme to bring his conduct within the statute." (At page 648).

It would appear, therefore that the Government must contend that the mailings of the warrants were an integral part of the scheme, it is clear, however, that the alleged scheme was not contingent upon the mailing. As related in the indictment, the purported scheme devised by the Petitioner was to deprive the citizens and the counties of the State of Oklahoma of their right to have county business conducted openly, honestly, impartially, and free from corruption and undue influence by their elected County Commissioners, and the use of the United States Mails in furtherance of the scheme. In other words, to fall under the Federal Mail Fraud Statute, the mailing of the County Warrants must have been an integral part of the scheme to defraud, with the mailing sufficiently closely related to the purported scheme.

The Petitioner would submit that it was immaterial to the scheme as alleged and proven, whether any County Warrants were ever actually mailed. As stated hereinabove, the Government wholly failed to show that County Warrants were the source of any money for kickbacks. Indeed, the evidence presented showed that the only potential source of founds for kickbacks was either Dorothy Griffin, or the Petitioner's own money. There was never any proof shown by the Government that the goods sold in each Count of the indictment were either overpriced, or not delivered. It would appear clear that the failure of proof logically relates to the nebulous scheme alleged in the indictment. Obviously, if the Government had any proof that the Warrants were in fact the source of the kickbacks, the scheme would have alleged that the Petitioner paid kickbacks, and was able to pay kickbacks, because of the mailings of padded, or bogus County Warrants. Not one Count of the indictment does so.

Petitioner would also submit that once the goods were delivered to the county, that the mailing of the Warrants were, in effect, compelled by State law. As such, this case, and the other County Commissioner cases, are strikingly similar to *Parr* v. *United States*, 363 U.S. 370, 80 S.Ct. 1170 (1960). In any event, as hereinabove mentioned, the fruition and execution of the purported scheme to defraud was not shown to depend on any mailings of County Warrants.

The Petitioner would submit that the circumstances in the instant case are similar to the *Parr* case in the following respects. Oklahoma State law compels County Commissioners to purchase materials, supplies and equipment to maintain and build their roads and bridges. Title 19 O.S.

Section 339. State law further requires payment for the county obligations to be made by County Warrant. Title 19 O.S. Section 347. Since the county is compelled to issue Warrants for payment of its obligations, the County Clerk is compelled to use the mails to perform his or her legal duties. All purchases made by the county for county purposes are paid for by County Warrants. Under Oklahoma law, there is simply no other way a county in the State of Oklahoma can pay its bills. Therefore, the mailings of County Warrants, for payment of county obligations, cannot be said to be unlawful and a plot incident to an essential part of a scheme within the Mail Fraud Statute, even assuming a kickback is allegedly paid after the Warrant is cashed. The mailings are made, not for purpose of executing a scheme to defraud, but for the purpose of paying the counties' bills.

Admittedly, if the Government had alleged and proven that Petitioner's sales to the various counties relative to the indictment were based upon non-existent equipment, whereby the county received no supplies or materials, then it could be argued that the mailings of the County Warrants would clearly be unlawful under the Mail Fraud Statute.

In relation to the Counts of the indictment relating to equipment sales through lease-purchase agreements, Counts 30 through 34 of the indictment, the alleged scheme was even more unrelated to the mailing of the Warrants. In those Counts, the Warrants were mailed to the bank for payment of the equipment, subsequent to receipt by the vendor of the proceeds from the sale (T.T. Vol. 1, p. 225, lines 22-25, p. 256, lines 1-11). Assuming arguendo, the

existence of a scheme, neither the Petitioner nor his employers would care whether County Warrants were ever mailed to the banks (T.T. Vol. I, p. 161, lines 7-20).

In the *Maze* case, this Court determined that the "mailing" must be for the purpose of executing the scheme in a criminal case brought under the Mail Fraud Statute. In *Maze,* the defendant obtained a credit card belonging to another, and obtained food and lodging at motels in California, Florida and Louisiana. Each of these businesses sent to the Citizens Fidelity Bank & Trust Company in Louisville, which had issued the card, invoices representing goods and services furnished to the defendant. The defendant was convicted under the Mail Fraud Statute; however, the Court of Appeals reversed the verdict and this Court affirmed the decision determining that the mailing by the establishments to the bank did not constitute a mailing for the purpose of executing the scheme. In that case, the Government contended that the delay in mailing the invoices to the bank allowed for additional use of the card without detection. In affirming the Circuit Court's decision, this Court stated:

> "We do not believe that *Sampson* sustains the Government's position. The subsequent mailings there were designed to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendant less likely than if no mailings had taken place. But the successful completion of the mailing from the motel owners here to the Louisville bank increased the probability that respondent would be detected and apprehended. There was undoubtedly delay in transmitting invoices to the Louisville bank, as there is in the physical transmission of any business correspondence between cities separated by large distances. Mail serv-

ice as a means of transmitting such correspondence from one city to another is designed to overcome the effect of the distance which separates the places. But it is the distance, and not the mail service, which causes the time lag in the physical transmission of such correspondence. . . . Congress could have drafted the mail fraud statute so as to require only that the mails be in fact used as a result of the fraudulent scheme. But it did not do this; instead, it required that the use of the mails be 'for the purpose of executing such scheme or artifice . . .' Since the mailings in this case were not for that purpose, the judgment of the Court of Appeals is affirmed."

The *Maze* case was preceded by a similar credit card case determined by the United States Court of Appeals for the Tenth Circuit. In *United States* v. *Lynn,* 461 F.2d 759 (10th Cir. 1972), the defendants obtained a credit card, owned by another party, and charged purchases in the State of Wyoming. Subsequent thereto, invoices were mailed from the establishments where goods and services were obtained to the issuing bank for payment. As in and prior to *Maze,* supra, the United States Court of Appeals for the Tenth Circuit reversed the defendant's conviction on the mail fraud count determining that the mails were not used for execution of the scheme. There, the Court stated:

"The gist of the offense of mail fraud lies in the use of the mails to obtain money or property by fraudulent means. Utilization of the mails after the scheme has been fully consummated and completed in all of its parts cannot supply the essential ingredients for this offense. An examination of Tenth Circuit decisions affirming convictions of violation cases consciously availed themselves of the use of the mails in completion of their scheme. We view the transaction in Little

> America and Cheyenne, Wyoming, by use of the Ros credit card, as completed when the goods were received in exchange for the credit card sales drafts. It is immaterial what method the retail establishments chose to collect from BankAmericard. Use of the mails was not an essential element of this scheme. The Federal Mail Fraud Statute does not purport to reach all frauds, but only those instances in which the use of the mails is a part of the execution of the fraudulent scheme. All other cases are to be dealt with by appropriate state law."

It should be noted that, in both cases, the Court determined that the scheme had been completed; however, that fact alone is not determinative as other cases have held mailing may be an integral part of the scheme even though subsequent to fruition of the scheme. The usual premise of alleging that the scheme was completed, prior to the mailings, arises solely from the inference that a mailing could not be "integral" if the scheme was already completed.

The Government, in its response to the Petitioner's Motion for New Trial, relied on the case of *United States* v. *Bottom*, 638 F.2d 781 (5th Cir. 1981), a Fifth Circuit case to distinguish the case at bar from *Maze*, supra, and *Lynn*, supra. In *Bottom*, the defendants were convicted subsequent to an alleged scheme whereby, they as County Commissioners, participated in receiving money from "padded" and "bogus" invoices. In that scheme, pipe was sold by a vendor, Baldwin, to the county in instances where less pipe was delivered exhibited on delivery tickets and where no pipe was delivered. In each of these instances, the County Commissioner was paid, in cash, for one-half of the profits from such sales. The County Commissioners were paid

prior to receipt of checks from the county for the purchases and the defendants alleged that the scheme was completed prior to the mailing of checks to Baldwin for the sales. Unfortunately for the defendants, one act remained for completion of the scheme. The county paid on the 10th of the month and subsequent to these payments, the County Commissioners initialed the checks when returned from the bank to finally approve the sale and payment. The Court rejected the arguments of the defendants and their reliance of *Maze*, supra, by distinguishing the circumstances. The Court went on to hold:

> "The fraudulent scheme in the instant case employed mailings which were integral to the execution of the fraudulent plans and which were not made after the fruition of the fraud but were necessary to complete the scheme. The scheme was not complete when Baldwin paid the defendants 'up-front' the bogus or padded amounts in the invoices because Baldwin still needed the assistance of the defendants, who were the only ones who knew about the fraud and who had control of all the paperwork in their districts, to initial copies of the checks which reflected payment of the phony invoice attached to it. Furthermore, the county was not defrauded by the commissioners, the money released and the checks mailed to Baldwin. From the beginning of the scheme the defendant commissioners, who knew that the invoices were bogus or padded, were also aware that Baldwin would be paid by a check mailed to him by the county. Therefore, in this case, the mailing of the checks was an essential step integral to the completion or fruition of the scheme."

At first blush, it appears that the *Bottom* case is more closely akin to the case at bar than *Maze*, supra. However, it must be remembered that, in the case at bar, the various

banks were the recipients of the County Warrants, and not Stewart or Redstone. Again, in the case at bar neither Petitioner nor his employers would care if the bank was ever paid the monthly installments, as they had already received their proceeds from the bank. It is also clear that the invoices in the *Bottom* case were padded or bogus.

Petitioner would submit that the trial court and the Circuit misconstrued or ignored the *Maze, Parr, and Kann* cases. Not because the scheme was completed prior to the mailing, but simply because the mailing of the monthly lease-purchase payment was totally unrelated and not an integral part of the alleged scheme.

Although this theory is more easily realized in lease-purchase situations, the same theory applies in relation to the sales of materials by the Petitioner. The mailings of the County Warrants to the vendors, Redstone and Stewart, were unnecessary for completition of the alleged scheme as the Government's evidence does not indicate any county funds were the source of Petitioner's alleged kickbacks. Obviously, the mailings of these Warrants were remotely related to the transactions, however, such use of the mails was not an integral part of the scheme and played no role in its completion.

Although the circumstances pertaining to the Counts of the indictment in which sales of materials were made, are different in that the Petitioner paid the alleged kick-backs subsequent to the mailings, this fact alone does not result in a reasonable determination that they were a step toward completion of the scheme. Under the Government's evidence, the scheme would reach fruition even though Warrants were never mailed to the vendors.

CONCLUSION

The opinion of the United States Court of Appeals for the Tenth Circuit affirming the Trial Court's conviction of the Petitioner herein erroneously ignores or expands this Court's prior holdings which require that a mailing, for purposes of Title 18 U.S.C. Section 1341, be sufficiently closely related to the alleged mail fraud.

For the reasons set forth hereinabove, the Petitioner requests that the Writ of Certiorari be granted.

Respectfully submitted,

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April, 1984

APPENDICES

APPENDIX A

PUBLISH

[Filed Sept. 30, 1983]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee.	)	
v.	)	No. 82-2309
HERB NEAL, Defendant-Appellant.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA
(D.C. No. CR-82-101-D)

Gene Stipe (Robert K. McCune with him on the brief) of Stipe, Gossett, Stipe, Harper, Estes, McCune and Parks, Oklahoma City, Oklahoma, for Defendant-Appellant.

Susie Pritchett, Assistant United States Attorney, (William S. Price, United States Attorney, Oklahoma City, Oklahoma, was also on the brief) for Plaintiff-Appellee

Before HOLLOWAY, McWILLIAMS and SEYMOUR, Circuit Judges

HOLLOWAY, Circuit Judge

This is a direct appeal by the defendant-appellant Herb Neal from his convictions on thirty-three counts of a thirty-four count indictment charging him with mail fraud and aiding and abetting mail fraud, in violation of 18 U.S.C.

§ 1341 and 18 U.S.C. § 2.[1] Neal was sentenced to terms of five years' imprisonment on each of his convictions, Count II to run consecutively to Count I and Counts III through XXII and XXIV through XXXIV to run concurrently to Count I. He wsa also fined $1,000.00 for each of the first two counts.

Viewing all the evidence, direct and circumstantial, together with all reasonable inferences therefrom, in the light most favorable to the Government as we must on this appeal from a guilty verdict, *United States* v. *Twilligear*, 460 F.2d 79, 81-82 (10th Cir.), the evidence tended to show the following:

I
Background

This case is one of many that arose from an extensive investigation by the F.B.I., the I.R.S., and the United States Attorneys for Oklahoma into payment to numerous county commissioners of kickbacks, by suppliers of equipment or materials purchased by the counties for road and bridge building and maintenance. During the period covered by the indictment Neal worked as a salesman for three companies in Ponca City, Oklahoma, that supplied such materials. All thirty-four counts were premised on allegations that Neal and others devised a scheme to defraud various counties and the citizens thereof "by depriving them of their right to have county business conducted openly, honestly, impartially, and free from corruption and undue influence by their elected County Commissioner and to use the . . . mails in furtherance of the scheme." (I R. 93). *Cf. United States* v. *Mandel*, 591 F.2d 1347, 1362 (4th Cir.), *cert. denied*, 445 U.S. 961 (bribery of public official satisfies fraud element of the mail fraud statute); *United States* v. *Gann*, No. 82-1591, ... F.2d .... , ... n.2 (10th Cir.).

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[1] Neal was found not guilty on count twenty-three. (VII R. 1007-08).

Seven different county commissioners testified at trial that they had received kickbacks from Neal.[2] (*E.g.*, V R. 248-50; VI R. 322-24, 409, 483, 547-48, and 573). Some stated that they had received kickbacks on every purchase from Neal while others testified that the kickbacks were only occasional. Moreover, some commissioners testified that not all suppliers gave kickbacks but they always tried to do business with suppliers like Neal who did give kickbacks. (*E.g.*, V R. 325). The payments generally approximated 10% of the purchase price. Some commissioners further testified that they had accepted "50-50 splits" from Neal, also known as "split" or "blue-sky" deals, in which the commissioner would order materials or supplies from Neal, the county clerk would issue a warrant, *i.e.*, check, to Neal as payment for the goods, the goods would not be delivered, and the commissioner and Neal would split the amount of the warrant between themselves.

Oftentimes the kickback was agreed to before a purchase was consummated, but generally the agreement was tacit that a kickback would be forthcoming. The kickback payment generally occurred after the county clerk had mailed the warrant to Neal and the material or supplies were delivered. Furthermore, the kickbacks were paid in cash and in a surreptitious manner with no one present but Neal and the commissioner, frequently while the parties were alone in Neal's car. In addition, six county clerks testified that warrants in payment for materials or supplies were always mailed unless the supplier was local and personally picked up the warrant. (V R 43, 50, 110, and 183). With respect to the counts on which these convictions resulted, mailing of the warrants was proved.

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[2] Each of these witnesses testified that they had entered into an agreement with the United States Attorney to fully cooperate with the investigation in exchange for being allowed to plead guilty to one count of conspiracy to commit mail fraud and to tax evasion, thus relieving the commissioners of the threat of numerous prosecutions based on their individual transactions. (*See e.g.*, III R. Pl. Exh. 47).

In his defense, Neal offered the testimony of several county commissioners to the effect that he never offered or paid them kickbacks, and that of several character witnesses who testified that Neal had a good reputation in his community. Neal also took the stand and testified that he had never paid a kickback, that the Government's witnesses were lying, and that some of the Government's witnesses had told him that they were simply going to tell the F.B.I. whatever they wanted to hear.

For reversal, Neal asserts that the trial court erred (1) in denying his motion for judgment of acquittal or in the alternative for a new trial because the evidence was insufficient to prove that the mails were used in furtherance of a scheme or artifice to defraud; (2) in overruling his motion in limine regarding evidence of the relationship between a Government witness and two of Neal's in-laws; (3) in not granting a pretrial request for a change of venue based on prejudicial pretrial publicity, and; (4) in denying his motion in limine concerning the introduction of evidence outside the times and places set forth in the indictment.

II

At the close of the Government's case Neal moved for a judgment of acquittal, claiming that the evidence had failed to show that the mailings were an integral part of the scheme. (VII R. 702-09). The motion was overruled, and then renewed at the close of all the evidence, and again overruled. (I R. 163-69; VII R. 710-11 and 958-59). Again, after the verdict Neal moved for a judgment of acquittal or, in the alternative, for a new trial, asserting the same argument. (I R. 187-91); *see* F.R.Crim.P. 29(c). On appeal Neal asserts that the trial court erred in overruling these motions in that the evidence failed to show that the use of the mails was an integral part of the scheme. (Brief of Appellant at 5 and 9).

Neal devotes the majority of his argument on this issue to Counts XXX through XXXIV, Counts that charged kick-

backs from lease-purchase transactions rather than direct purchases.[3] Relying on *United States* v. *Maze*, 414 U.S. 395 (1974), *Parr* v. *United States*, 363 U.S. 370 (1960), *Kann* v. *United States*, 323 U.S. 88 (1944), and *United States* v. *Lynn*, 461 F.2d 759 (10th Cir.), *inter alia*, Neal contends that the mailings by the counties to the banks of monthly lease-purchase payments were "totally unrelated and not an integral part of the scheme," reasoning that the kickbacks had been paid prior to the use of the mails and thus the mailings played no role in the completion of the scheme. (Brief of Appellant at 9-10). Furthermore, Neal contends that the Government's proof as to the use of the mails was inadequate in the counts alleging kickbacks on direct purchases as well. (*Id.*).

We see no need to delve into these arguments in detail as we have considered and rejected them in related cases filed today. *See United States* v. *Primrose*, No. 82-1842, ____ F.2d ____, (10th Cir.); *United States* v. *Gann*, No. 82-1591, ____ F.2d ____ (10th Cir.); *and see United States* v. *Whitt*, No. 82-2231, ____ F.2d ____, (10th Cir.); *United States* v. *Boston*, No. 82-1323, ____ F.2d ____ (10th Cir.).

In *Primrose* we held that the mailing of the warrants from the county clerk to the vendor was an essential part of the scheme, regardless of whether the kickback was paid before or after the mailing. *Primrose, supra*, at ____, slip op. at 10-12. There, the defendant was a country commissioner and the argument that the scheme was complete upon recept of the kickback was rejected. Here, Neal being the salesman for various vendors, the mailing of warrants to the vendors is even more closely within the scheme. Likewise in *Gann*, a case involving a lease-purchase agreement,

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[3] In the case of a lease-purchase agreement the county would lease equipment from the supplier with an option to purchase the equipment at the end of the lease. The supplier would assign its rights under the lease to a bank, Neal would pay a kickback to a county commissioner, and the county would issues monthly payments (warrants) to the bank.

we found the mailing of a warrant from the county clerk to a bank to be an integral part of the entire transaction and in furtherance of the scheme to defraud. *Gann, supra,* at ..... , slip op. at 5-6.

The circumstances in the instant case are similar to those in *Primrose, Gann, Whitt,* and *Boston* and the mailings in all these cases were sufficient to bring the charges within the purview of § 1341. Viewing the evidence in the light most favorable to the Government as we must in reviewing the Distirct Court's refusal to grant a motion for judgment or acquittal, *United States* v. *Tager,* 481 F.2d 97, 100 (10th Cir.), *cert. denied,* 415 U.S. 914, we conclude that the trial court did not err and that Neal's argument that the evidence was insufficient to support the mail fraud convictions is without merit.

III

Neal next contends that the court erred in refusing to grant his pretrial motion in limine by which he asked the trial court to direct the Government not to refer to evidence concerning relationships between Government witness Dorothy Griffin and Neal's father-in-law, Ralph Stewart, or brother-in-law, Monty Stewart.[4] (I R. 144). The motion was overruled. (I R. 146).

Griffin testified that she was the owner of a lumber company that frequently did business with county commissioners and other suppliers to county commissioners. (III R. 657). Griffin stated that her company provided a "service" to other vendors, among them Stewart Supply Company. The "service" provided was as follows: a supplier

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[4] Ralph Stewart was the owner of Stewart Supply Company, one of the three supply companies which employed Neal as a salesman during the period covered by the indictment. Monty Stewart was Ralph Stewart's son and was also employed by Stewart Supply Company.

would give her a check for the purchase of materials or supplies which neither party ever intended to be delivered, Griffin would cash the check and return ninety to ninety-five percent of the cash to the supplier along with a bogus invoice for the undelivered goods, and Griffin would keep the balance of the cash as her commission. (VI R. 658-61). The supplier then used the invoices as a record, which was false, of the supplier's expenditures, and as a means of obtaining cash to pay kickbacks.

Griffin stated that she provided this "service" for Stewart Supply Company while Neal worked there and identified some eighteen bogus invoices made for Stewart Supply totalling approximately $80,000.00 worth of goods, as well as numerous checks from Stewart Supply used to pay for the invoices. (III R. Pl. exhs. 57, 57A through Q, 58, and 58A through X). Among the checks, Griffin identified one (III R. pl. exh. 58P), signed by Neal, used as payment for three phony invoices. (III R. Pl. exhs. 57M, N, and O; VI R. 671-74). Indeed, some of the invoices were made out for materials, such as steel pipe, that were not even sold by Griffin's lumber company. She further testified to meeting Ralph Stewart and Neal in an Oklahoma City coffee shop where Stewart indicated that he wanted some bogus invoices so that "he would have some money to operate on with his Commissioners." (VI R. 662). This was the only time Griffin ever met Neal. (VI R. 661). She identified him at trial. (*Id.*).

On appeal, Neal contends that this testimony was both irrelevant and prejudicial in violation of Rules 401 and 403 of the Federal Rules of Evidence. Specifically he claims that the prejudice "arose from the prosecutor's ability to inject Ralph Stewart into the trial of this action in order to attempt to prove that Herb Neal paid kickbacks because it was company policy." (Brief of Appellant at 11-12). We cannot agree.

In order for evidence to be relvant it need only "[tend] to make the existence of any fact that is of consequence

to the determination of the action more probable or less probable than it would be without the evidence." Rule 401 F.R.E. Here, the Government had to establish use of the mails in furtherance of a scheme to defraud in order to meet its burden in proving a violation of § 1341. A portion of the scheme alleged was that Neal would pay cash kickbacks to various county commissioners. The Griffin testimony indicated that Neal was present when Griffin and Ralph Stewart, Neal's father-in-law, discussed the purchase of bogus invoices used as a means of obtaining funds for the payment of kickbacks. Furthermore, the documentary evidence introduced during Griffin's testimony showed Neal's signature on a check from Stewart Supply Company to Griffin's lumber company for more than $4,000.00 worth of materials and supplies that were never delivered.

The trial court is granted broad discretion in ruling on the relevance of evidence, *see Hackbart* v. *Cincinnati Bengals, Inc.*, 601 F.2d 516, 525-26 (10th Cir.), *cert. denied*, 444 U.S. 931, and this court will not disturb that discretion absent a clear showing of abuse. *Texas Eastern Transmission* v. *Marine Office-Appleton & Cox*, 579 F.2d 561, 566-67 (10th Cir.). We feel the questioned testimony and documentary evidence was probative of a scheme to defraud and find no abuse of discretion in the trial court's ruling in that respect.

We are mindful, however, that relevant evidence should be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.[5] As with Rule 401, a trial court has broad discretion under the Rule to determine whether the probative value of the evidence is

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[5] Rule 403 F.R.E. provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

substantially outweighed by the danger of unfair prejudice. *See* Rule 403 F.R.E.; *United States* v. *Franklin*, 704 F.2d 1183, 1187 (10th Cir.); *United States* v. *Nolan*, 551 F.2d 266, 271 (10th Cir.), *cert. denied*, 434 U.S. 904. Our review of the record reveals that the trial transcript includes more than one thousand pages and Griffin's testimony covered only 46 of those pages. Griffin testified that the only time she met Neal was at her meeting with Ralph Stewart and that Neal did not play an active role in that meeting. Under these circumstances we cannot say the trial judge abused his discretion in admitting this testimony.

IV

Neal argues further that the trial court erred in denying his pretrial motion to transfer the case to another district due to excessive pretrial publicity, citing *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), *inter alia*.

In *Sheppard*, the defendant, who was suspected of murdering his wife, was exposed to extensive pretrial publicity including a three day televised inquest before an audience of hundreds of persons, publication of the names and addresses of the potential jurors in the major local newspapers more than three weeks prior to trial, and heavy newspaper, television, and radio coverage calling for the defendant's arrest, detailing an extra-marital love affair, and revealing that Sheppard had repeatedly refused to take a lie detector test, among other things.

Except as otherwise permitted by statute or the rules, a criminal prosecution is to be conducted "in a district in which the offense was committed." Rule 18, F.R.Crim.P. In instances of pretrial publicity, however, Rule 21(a), F.R.Crim.P., provides as follows:

> For Prejudice in the District. The court upon motion of the defendant shall transfer the proceeding as to him to another district whether or not such district is specfied in the defendant's motion if the court is

> satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district.

Under the rule, the grant or denial of a motion for a change of venue in a criminal case is within the trial court's discretion and, absent an abuse of that discretion, the ruling will not be disturbed on appeal. *See United States* v. *Hunter*, 672 F.2d 815, 816 (10th Cir.); *United States* v. *Jobe*, 487 F.2d 268, 269-70 (10th Cir.), *cert. denied*, 416 U.S. 955.

Unlike the *Sheppard* case, here Neal cites no specific instance of prejudcial publicity. In addition, defendant candidly admits that "[t]here has been little pretrial publicity concerning the particular appellant, Herb Neal. . ." (Brief of Appellant at 12). Defendant contends, nevertheless, that here the publicity "was even more insidious because the publicity was administered in such a broad and bold stroke that all defendants in these cases were tainted." *Id.* at 12.

However, ". . . when publicity is about the event, rather than directed at individual defendants, this may lessen any prejudicial impact." *United States* v. *Hueftle*, 687 F.2d 1305, 1310 (10th Cir.). Here defendant Neal submitted no evidence to make a record about the pretrial publicity which we can review. Moreover, "the proper occasion for determining juror partiality is upon voir dire examination." *United States* v. *Lamb*, 575 F.2d 1310, 1315 (10th Cir.), *cert. denied*, 439 U.S. 854. Neal has not designated the *voir dire* transcript as part of the record and we cannot speculate as to what the record of that examination might reveal as to any prejudicial effect on the venire.

On the record before us we see nothing to indicate that the trial court abused its discretion in denying the venue change, especially in a case such as this where, by Neal's admission, the publicity was not generally directed at him. *See United States* v. *Hueftle, supra*, 687 F.2d at 1310.

V

Neal's final argument is that the trial court erred in denying his motion in limine by which he attempted to prevent the introduction of any evidence as to a scheme to defraud or as to the payment of kickbacks which occurred outside the times and places charged in the indictment. In his brief in support of the motion he argued that such evidence "would be prejudicial and cumulative" and unnecessary to prove the existence of a scheme in that evidence as to the thirty-four counts charged should suffice. (I R. 143).

Here again our holding is guided by a companion opinion which considered and rejected a similar argument. In *United States* v. *Primrose,* No. 82-1842, ... F.2d ..... (10th Cir.), where defendant-appellant Primrose was charged with thirty-eight counts of mail fraud, among other things, and substantial evidence of a scheme outside the time frame charged in the indictment was admitted, we found no abuse of discretion on the part of the trial court. As in the *Primrose* case, here the court gave a cautionary instruction each time such evidence was admitted (*see e.g.* VI R. 488) and, in his charge to the jury, the judge instructed that evidence of crimes concerning offenses not charged in the indictment might be considered for the limited purpose of proof of "motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident . . . ." (VII R. 986; *see also* Rule 404(b) F.R.E.). Slip op. at 15-17. On the reasoning in *Primrose,* we conclude that Neal's argument is without merit.

VI

The defendant appellant has demonstrated no reversible error in the record of his trial and accordingly the judgment is

AFFIRMED.

APPENDIX B

[Received Court of Appeals, Oct. 14, 1983]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA, Appellee,	)	
vs.	)	No. 82-2309
HERB NEAL, Appellant.	)	

PETITION FOR REHEARING

COMES NOW the Appellant, and Petitions this Court for a Rehearing. In support of his Petition for Rehearing, Appellant would point out to the Court that it has apparently overlooked or misconstrued certain arguments raised by Appellant in his Appeal.

Concerning the examination of prospective Jurors, this Court held that Voir Dire conducted by the Trial Court to test the Jurors' impartiality was not an abuse of discretion and that the nature of the publicity in the County Commissioner cases did not mandate greater care than was taken so as to insure impartiality. The Court seemed to place emphasis on the fact that none of the articles explicitly dealt with the Appellant alone, and thus distinguish this case from the *Silverthorne* case cited by Appellant in his Brief.

Appellant contends that it was not necessary for the Pre-Trial publicity to be focused on him alone. The Thrust and gist of the Pre-Trial publicity as evidenced by the newspaper articles made part of the record was that there was massive and widespread corruption among County Commissioners and suppliers in the State of Oklahoma. In fact, the scientific survey submitted into the record by the Appellant, indicated that over ninety-four (94) per cent of the people in the State of Oklahoma were aware of the

Federal investigation into County Commissioner kickbacks and that over sixty-two (62) per cent of the people of the State of Oklahoma felt that there was widespread corruption among County Commissioners. This information alone should have put the Trial Court on notice that there would be people on the prospective Jury Panel with pre-formed opinions. Yet the Trial Court failed to conduct a very searching Voir Dire to discover whether there were any persons on the Panel with pre-formed opinions. The Trial Court, as does this Court, concluded that the Voir Dire was sufficient because each Juror assured the Court that they could be fair and impartial.

The Court has thus overlooked the thrust of the holding in the recent case of *United States* v. *Blanton*, 700 F.2d 298 (6th Cir. 1983). The *Blanton* case was incorporated into all the County Commissioner briefs and arguments by way of subsequent letter to this Court. The Sixth Circuit concluded from a survey of cases from nearly every Circuit that perhaps not so much deference should be given to a Juror's assessment of his own impartiality. The *Blanton* case involved a public figure and substantial Pre-Trial publicity, as does the instant case. As in the instant case, the Trial Court in *Blanton* failed to inquire into the nature and extent of the Jurors' exposure to Pre-Trial publicity. The Court found that the Voir Dire conducted by the Trial Court was not sufficient to determine the percentage of the veniremen who had a preconceived opinion and was further insufficient to determine the strength of the opinions, despite the assurances by the Jurors that they could be fair and impartial.

Appellant contends that the assurances of a Juror that he can be fair and impartial should not be afforded much deference in cases of substantial Pre-Trial publicity. That at a minimum, a Trial Court should at least inquire into the extent and sources of a Juror's exposure to Pre-Trial publicity. Only then will Counsel for Defendants be able to adequately assess a Juror's impartiality, and then in-

telligently exercise pre-emptory challenges and challenges for cause.

Appellant contends that his case was a proper one for a more searching Voir Dire. He was a County Commissioner in the State of Oklahoma at the time of Trial. There had been widespread and massive publicity about the Federal Investigation into the so called kickback scandal involving County Commissioners in the State of Oklahoma. Evidence was introduced through Pre-Trial Motions that a majority of the people in the State of Oklahoma thought there was widespread corruption among County Commissioners. The fact that the Appellant was not named spesifically in these articles should not be determinative of this issue, for the reasons heretofore cited.

WHEREFORE, the Appellant respectfully requests this Court to grant a Rehearing on the issue of adequacy of the Trial Court's Voir Dires so that he may further advance the arguments cited in this Petition for Rehearing.

Appellant further contends that this Court has misconstrued the Supreme Court's holding in the *Parr* case. The Court distinguishes *Parr* from the instant case apparently because the persons who did the mailing in Parr were not participants in the scheme. The Court states that the Appellant's reliance on *Parr* is misplaced because it rests on his view of the vendors as outsiders rather than as participants in the scheme. The Court states that if the scheme is properly viewed as including the vendor's receipt of County business as well as the Appellant's receipt of kickbacks, then the analogy to *Parr* breaks down, yet the Court fails to state why this is so.

Appellant contends that the *Parr* case is applicable to the instant case for the reason that the mailing in each instance are only incidental or collateral to the scheme, and not for purposes of executing the alleged scheme. The offenses involved in *Parr* and the instant case are of the type that should be dealt with by appropriate State law.

They involve local officials misappropriating local funds. The mails are not used to further the scheme to defraud nor are they used to delay the detection of the scheme to defraud. The fraud is executed when the County Commissioner and the vendor meet and agree that a kickback should be paid. That meeting of the minds is the gist of the offense. How that fraud is achieved or carried out is only a collateral matter. This type of scheme is unlike the typical mail fraud scheme wherein the mails are used to initiate or execute the fraud itself. In this case, the fraud is executed without the use of the mails. The mailing of the County Warrants or Invoices had no real affect on this scheme for the reason that the scheme could have just as easily taken place if the warrants and invoices had been picked up by the supplier as they were in many instances.

In conclusion, the Appellant contends this Court has broadened the mail fraud statute beyond the scope intended by Congress. It has turned what is essentially a State or Local offense into a Federal crime. The Supreme Court has addressed a case similar to the one at bar and has held that the mailings in question were not sufficient to invoke the mail fraud statute.

Appellant respectfully requests this Court to reconsider its holding in this case and reverse the mail fraud convictions.

WHEREFORE, the Appellant respectfully requests this Court to grant his petition for Rehearing and to hold further argument in this case or in the alternative to reverse the convictions on all counts for the above cited reasons and if necessary, to remand this case to the District Court for further proceedings.

Respectfully submitted,

HERB NEAL, Appellant

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Attorneys for Appellant.

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APPENDIX C

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JANUARY TERM—February 17, 1984

Before Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams and Honorable Stephanie K. Seymour, Circuit Judges.

UNITED STATES OF AMERICA, Plaintiff-Appellee.	)	
vs.	)	No. 82-2309
HERB NEAL, Defendant-Appellant.	)	

This matter comes on for consideration of appellant's motion for leave to file petition for rehearing out of time and appellant's petition for rehearing.

Upon consideration whereof, the application to file petition for rehearing out of time is granted to and including October 14, 1983.

It is further ordered that appellant's petition for rehearing is denied.

HOWARD K. PHILLIPS, Clerk

By (s) *Robert L. Hoecker*
Chief Deputy Clerk

No. 83-1695

In the Supreme Court of the United States

OCTOBER TERM, 1983

HERB NEAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

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QUESTION PRESENTED

Whether the mailings of warrants by a county in payment for supplies ordered from petitioner were an integral part of petitioner's fraudulent scheme.

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No. 83-1695

HERB NEAL, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 718 F.2d 1505.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 1983. A petition for rehearing was denied on February 17, 1984 (Pet. App. C). The petition for a writ of certiorari was filed on April 17, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Oklahoma, petitioner was convicted on 33 counts of mail fraud, in violation of 18 U.S.C. 1341 and 2.[1] He was sentenced to five years' imprisonment

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[1]Petitioner was acquitted on one count.

on each count, Count 2 to run consecutively to Count 1 and the remaining counts to run concurrently with Count 1, for a total of 10 years' imprisonment. He was also fined $1,000 on each of Counts 1 and 2. Pet. App. 1a-2a.

1. The evidence at trial showed that from 1975 through April 1981 petitioner worked as a salesman for three companies in Ponca City, Oklahoma, that sold equipment and materials to Oklahoma counties for road and bridge building and maintenance. During that time, petitioner paid kickbacks to seven county commissioners. The amount of the kickbacks generally approximated 10% of the purchase price on county procurements. See, *e.g.*, Tr. 509, 513-517 (Counts 1-9), 409, 411-425 (Counts 10, 30-32), 321-325 (Counts 11-23, 34), 616-623 (Counts 24-29), 249-257 (Count 33).

The mechanisms for effectuating the scheme varied. On several occasions, the amount of the kickback was expressly agreed to before the purchase was consummated (see, *e.g.*, Tr. 252-253, 280-281, 303, 325-326, 328, 333, 384-385, 394, 619-621). More often, however, the parties tacitly agreed that a kickback would be forthcoming (see, *e.g.*, Tr. 335, 349, 438, 441, 463-475). Petitioner generally paid the kickback after the materials or supplies were delivered and the county clerk mailed the warrant.[2] See Tr. 254-257; Pet. App. 3a.

Several commissioners accepted "50-50 splits" from petitioner in which the commissioner ordered materials or supplies and the county clerk issued a warrant in payment, but the goods were not delivered and the commissioner and

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[2]Warrants are similar to checks. They are issued by county clerks and mailed to vendors in payment for county purchases (Tr. 42-43, 47, 49-50, 53, 98, 110-111, 114-115).

petitioner split the cash.[3] See Tr. 320, 398, 568-570. Occasionally, petitioner offered a county commissioner a lease-purchase agreement. After the commissioner signed the purchase agreement, the contract was assigned to a bank which in turn paid petitioner's company the cash value of the equipment. Thereafter, the county mailed warrants to the bank as monthly payments for the equipment and petitioner paid the commissioner a kickback. See Tr. 252-257, 303-304, 325-328, 384-385, 393-394, 412-416, 418-420, 618-621.

The kickbacks were always in cash and were paid in a surreptitious manner, frequently while petitioner and the commissioner were alone in petitioner's car (Pet. App. 3a).

2. The court of appeals affirmed (Pet. App. 1a-11a). It rejected petitioner's principal argument, which was directed at the five counts involving lease-purchase agreements (Counts 30-34). Since the kickbacks had been paid prior to the time the warrants were mailed, petitioner contended that the mailings were " 'totally unrelated and not an integral part of the scheme' " (Pet. App. 5a). Relying on its decision in *United States* v. *Primrose*, 718 F.2d 1484

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[3]Dorothy Griffin, operator of Griffin Lumber Company, testified that she provided false invoices to petitioner and other vendors. When vendors and commissioners agreed to a "50-50 split" of the warrants issued in payment for materials that were never delivered, a bogus invoice provided the record of a supplier's expenditures that was necessary to maintain the appearance of a bona fide contract. Suppliers commonly gave Griffin checks in payment for the fraudulent invoices; Griffin would then cash the checks, retain 5% to 10% as commission, and return the remainder to the supplier. In this way, a supplier could also discreetly obtain cash to be used for the payment of kickbacks. Tr. 658-661. Griffin provided this service for a supply company that employed petitioner at least 18 times during petitioner's tenure. She also had one meeting with petitioner and the owner of the company at which the owner indicated that he wanted some bogus invoices so " 'he would have some money to operate on with his Commissioners.' " Tr. 660-675; Pet. App. 6a-7a.

(10th Cir. 1983), cert. denied, No. 83-1694 (May 14, 1984), the court concluded (Pet. App. 5a) that "the mailing of the warrants * * * was an essential part of the scheme, regardless of whether the kickback was paid before or after the mailing." The court noted (*ibid.*) that whereas *Primrose* involved a defendant who was a county commissioner, petitioner's role as a salesman for various vendors made the "mailing of warrants to the vendors * * * even more closely within the scheme." Moreover, as it had in *United States* v. *Gann*, 718 F.2d 1502 (10th Cir. 1983), the court held that the procedures used in the lease-purchase agreements, where the warrants were mailed to a bank rather than directly to a vendor, did not alter the conclusion that the mailings were "an integral part of the entire transaction and in furtherance of the scheme to defraud" (Pet. App. 6a).

ARGUMENT

Petitioner, relying principally on *United States* v. *Maze*, 414 U.S. 395 (1974), contends that the government failed to prove that the mailings of county warrants were an integral part of the scheme to defraud. This fact-bound contention was properly rejected by the court of appeals. Moreover, this Court recently denied certiorari in two similar cases presenting this issue. *United States* v. *Boston*, 718 F.2d 1511 (10th Cir. 1983), cert. denied, No. 83-1701 (May 14, 1984); *United States* v. *Primrose*, 718 F.2d 1484 (10th Cir. 1983), cert. denied, No. 83-1694 (May 14, 1984). This case presents nothing that would call for a different result.[4]

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[4]Indeed, the Petition for Rehearing (at 2) in *Primrose*, filed by the same counsel who represents petitioner, states that "the fact patterns and legal issues in [t]his case are closely related and virtually identical to those in *Neal*, [and] that this Court should give similar treatment to both cases." We agree; neither case warrants further review.

1. Petitioner first argues (Pet. 12-16) that the government failed to show that the warrants were the source of any money for kickbacks; hence, the mailings were not an integral part of the scheme to defraud. In petitioner's view, the scheme to deprive citizens of their right to uncorrupted government services reached fruition once the goods were delivered to the county. Thus, petitioner contends, the mailings of the warrants were merely incidental. The court of appeals, relying on *Primrose*, correctly rejected this argument (Pet. App. 5a).

In *Primrose*, a county commissioner similarly argued that because the mailings occurred after the kickbacks were paid, they could not have been made as part of the scheme because the fraud had already reached fruition. The court found that view to be too narrow; the scheme to defraud county citizens included not only the commissioners' receipt of kickbacks, but also the supplier's receipt of warrants from the county. The scheme did not reach fruition, then, until the supplier received payment. *United States* v. *Primrose*, 718 F.2d at 1489. See also *United States* v. *Bottom*, 638 F.2d 781, 785-786 (5th Cir. 1981); *United States* v. *Boyd*, 606 F.2d 792, 794 (8th Cir. 1979). As in *Primrose*, the scheme in the instant case included petitioner's receipt of county funds; it was not completed until the warrants were mailed.[5]

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[5] *Parr* v. *United States*, 363 U.S. 370 (1960), upon which petitioner relies (Pet. 15-16), is inapposite. In *Parr*, members of a school board, its secretary, its attorney and bank officers misappropriated the school district's funds. The mailings were alleged to be the school board's assessment and collection of taxes — the source of the misappropriated funds. This Court found that such mailings, made under requirements imposed by state law, were not criminal under the mail fraud statute, even if those who were required to do the mailing planned to steal some of the moneys. 363 U.S. at 387. In the instant case, by contrast, although the commissioners were required by law to buy supplies and to pay for them by warrants, they were not required to purchase the supplies from vendors who paid kickbacks. See *United States* v. *Primrose*, 718 F.2d at 1491.

2. Relying on *United States* v. *Maze*, 414 U.S. 395 (1974), petitioner further argues (Pet. 16-21) that for those counts based on the lease-purchase contracts (Counts 30-34), the monthly mailings of warrants to the banks by the county were unrelated to the scheme; before the contracts were assigned to the bank, petitioner contends, the kickbacks had already been paid and petitioner had already received his money. Thus, he contends that the mailing of the monthly lease-purchase payment was an extraneous detail. Petitioner's argument was properly rejected by the district court and the court of appeals.

At trial, the district court considered whether the monthly mailings of county warrants to the banks were in furtherance of the illegal scheme and determined (Order Denying Defendant's Motion for Verdict of Acquittal at 2-3 (filed Sept. 21, 1982)) that

> the payments made by the County to the banks involved were an integral part of the alleged scheme to defraud, which scheme was not consummated by the payment of the kickbacks, as the seller in each instance still had title to the equipment sold to the County, had agreed to hold the banks harmless and was relying on the payments sent through the mails to avoid default of the lease/purchase agreements, repossession and possible ultimate liability of seller to the banks.

In assigning the lease-purchase agreement to the banks, petitioner assigned only the paper, not the equipment. If the county defaulted, the seller could repossess the equipment and would be accountable to the banks for the remaining monies owed on the contract. Accordingly, the district court found — and the court of appeals agreed — that the monthly mailings of warrants to the bank were an integral part of the scheme.

This arrangement, then, is unlike the facts of *United States* v. *Maze*, *supra*. There the fraudulent credit card scheme had ended before the invoices were mailed. In the instant case, by contrast, the success of petitioner's continuing scheme to pay kickbacks to obtain municipal business depended in large part on the county's fulfillment of its obligations. If the county had not mailed the monthly warrants, petitioner would, in effect, have had to repossess the equipment and return the money to the bank.

In addition, as the Tenth Circuit held in a similar case —*United States* v. *Gann*, 718 F.2d 1502, 1504 (1983) — in these circumstances it is irrelevant whether the warrant was mailed to a bank or to petitioner's company. Both the commissioner and the supplier knew that it was customary practice for suppliers to assign lease-purchase agreements to banks and both parties relied on the banks to pay petitioner the amount owed on the contract in return for the monthly installments paid by the county. "Absent the financing arrangement between the vendor and the Bank, the county would have paid the money directly to the vendor * * *. [Hence] the county's payment to the Bank, instead of to the vendor, was an integral part of the entire transaction and in furtherance of the scheme to defraud county citizens." *Ibid.* In short, there is no reason to reward petitioner's use of a more sophisticated mechanism for the illegal flow of funds where the substance of the arrangement is simply a variation on an undoubtedly unlawful mail fraud.[6]

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[6]In any event, because petitioner's sentence on the lease-purchase counts is concurrent to his sentence on other counts, further review is unnecessary.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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